# INDEX.

PAGE

Statement . . . . . 1

Assignment of Errors . . . . . 8

Argument . . . . . .

Coals produced at inland mines being bought by the United States, and being, under the contract, loaded at railroad termini by the sellers onto barges of the United States and carried on those barges, at the expense of the sellers, to the points of final destination, were not a subject for land-grant deductions from the railroad rates fixed by the tariffs for the transportation to the seaboard . . . . . 10

Coals produced at inland mines being bought by the United States, and being, under the contract, loaded at railroad termini by the sellers onto barges of the United States, and the sellers being responsible for the safety of the property until after inspection and acceptance and said reloading, were not subjects for land-grant deductions from the railroad rates fixed by the tariffs for the transportation to the seaboard . . . . . 10

The United States, upon shipments of coal to seaboard, is not exempt from conditions, made in special tariffs, for the use of switching tracks and a plant for loading the contents of cars onto ships . . . . . 11

The United States, upon shipments of coal to seaboard, is not exempt from conditions, made in special tariffs, for the use of switching tracks and a plant, not owned or operated by the railroad company, which had transported the coals . . . . . 16

Shipment of coals to seaports and reshipment therefrom to other coast points or to river points is not export . . . . . 12

CASES CITED.

Illinois Central Railroad Co. *v.* United States, 265 U. S. 209 . . . . . 9
United States *v.* Union Pacific R. R. Co., 249 U. S. 354 . . . . . 12
Louisville & Nashville R. R. Co. *v.* United States, 258 U. S. 374 . . . . . 12
Missouri Pacific R. R. Co. *v.* United States, 56 Ct. Cls. 341 . . . . . 12
Interstate Commerce Comm. *v.* Stickney, 215 U. S. 98 . . . . . 13
Manufacturers Railway Co. *v.* United States, 246 U. S. 457 . . . . . 14
Southern Railway Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297 . . . . . 15

# Supreme Court of the United States.

October Term, 1924.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
*v.*
THE UNITED STATES.
No. 29.

## BRIEF FOR APPELLANT.

This case, being an appeal from the Court of Claims, presents two distinct claims of appellant for compensation with respect to the use (1) of a land-aided line of railroad and (2) of switch tracks, hoists and chutes, at Mobile, Alabama, and Pensacola, Florida, not connecting with the particular track which received such aid. One question presented is the applicability of land-grant rates, viz: fifty percent of those fixed by the commercial tariffs, to transportation over the land-aided track of commodities of which, as appellant contends, the Government was not the owner. On this general question, though on facts radically different from those which occur in this case, the court in a case of the *Illinois Central Railroad Company* v. *The United States*, 265 U. S. 209, rendered a decision in the Government's favor. The other question, which has not previously been before this court, is whether, out of rates fixed by special tariffs for switching or "spotting" of cars and hoisting of coal and chuting it onto ships, the Government should have deductions of fifty per-cent because of the land-aid to the disassociated track.

The latter of these questions turns on certain peculiar provisions of the tariffs referred to. For determination of those points, the railroad geography of that region must be understood.

The main line of the Louisville & Nashville railroad, from Cincinnati to New Orleans, is land-aided in the State of Alabama between Decatur, on the Tennessee River, and Flomaton, near the Florida boundary as is another of its lines extending from Flomaton, through Pensacola, to River Junction, Florida. No aid was received by the main line between Flomaton and New Orleans. Flomaton is sixty miles from Mobile and forty-four miles from Pensacola. This main line penetrates or skirts extensive coal fields, lying mainly in what is known as the "Birmingham district." A few of the coal mines are on this Louisville & Nashville main line, but the majority of them are on branch lines of this company or on lines of other companies. Some coals going to Mobile or Pensacola by this Louisville & Nashville main line, whether mined on its own side lines or on the lines of other carriers, reach that line at Birmingham, Warrior, New Castle, Boyles, Helena, Calera and some other stations. In some cases, where the distance from the mines to Birmingham is short, the freight rates are equalized between the shipping points and Birmingham. In other cases, because of greater distances or for other reasons, the rates from the mines are greater than from Birmingham.

The tariff immediately concerned was issued in January, 1915, an evolution from one issued in December, 1911. The special aim of these tariffs was to promote sales of coals for export, and so it was provided that wherever the Louisville & Nashville Company received from the haul, proper, of such coal, for that purpose, as much as one dollar a ton, it would

itself bear the spotting and hoisting charges. The company owned and operated spotting and hoisting plants at Pensacola, but at Mobile they were operated by a separate corporation. All were built entirely without land-aid.

Said tariff of January 30, 1912, was entitled "I. & N. R. R. Tariff, G. F. O. No. 1791; I. C. C. No. A–12137," and there were supplements thereto numbered 42, 44, 45, 46, 47, 49, 50 and 51, becoming effective at various dates in 1915. Among the "rules and regulations" of said tariff was the following:

> In the absence of specific provision to the contrary, shipments transported under this tariff will be subject to all terminal charges and all allowances, such as: Arbitraries, Car Rentals, Car Service, Demurrage, Diversion, Drayage, Handling, Inspection, Mileage on Private Cars, Overloaded Cars, Handling of, Reconsignment, Switching, Transit Privileges, Wharfage; together with all other privileges, charges, and rules which in any way increase or decrease the amount to be paid on any shipment between points named in the tariff, or as the same may be amended, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

Said supplement No. 42 and each of said later supplements contains, after its statement of rates, a note of the following text:

> (*c*) On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton of 2,000 lbs. or more, the cost of transferring the coal from cars onto barges or into vessels through the hoist of the Mobile Coal Co. (Mobile, Ala.), and L. & N. R. R. Co. (Pensacola, Fla.), will be assumed by the Louisville & Nashville R. R. Co.

(*d*) On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of less than $1.00 per ton of 2,000 pounds, the cost of transferring coal from cars onto barges or into vessels will be ten cents per ton of 2,000 lbs., plus $2.00 per car switching, or spotting charge in addition to the freight rate, subject, however, to a maximum total charge of $1.00 per ton of 2,000 lbs., including transportation and hoisting and switching (or spotting) service.

Said tariff and supplements contained other special provisions, with respect to spotting and hoisting charges and other matters, applying to shipments originating on other railroad lines than appellant's and from which therefore appellant did not receive the entire earnings.

Said tariff and said supplements thereto were all filed with and approved by the Interstate Commerce Commission.

Except in one instance, the coals with which this case is concerned were for use of the Corps of Engineers of the Government in river and harbor improvements at or near Mobile or Pensacola or at or near to Pascagoula and Gulfport, in Mississippi, or Fort Morgan, in Alabama, to which other Mississippi or Alabama points the transportation from Mobile was by Government barges. All of the coals were handled by the spotting and hoisting appliances above described.

The rates applicable by said tariff and its supplements between said points of Mobile and Pensacola ranged from $1.00 to $1.15 per ton on coals to be exported or to be reshipped for commercial uses to Texas or Florida points, and $1.10 to $1.25 per ton on coals for other uses. After making land-grant deductions with respect to appellant's track between Decatur and Flomaton or parts of the same, the net compensa-

tion accruing to appellant for the road haul to Mobile or Pensacola ranged from 55 cents to 69.3 cents per ton.

Appellant's bills for this transportation were paid through the Auditor for the War Department. They included charges of 10 cents per ton for spotting and hoisting of the coals. In making his settlements and payments, the Auditor, taking as bases the land-grant rates, deducted the amounts of these terminal charges. Appellant protested and appealed to the Comptroller of the Treasury, but to no avail.

Another question, suggested by this case, relates to the effect, in contracts by which the Government obtained coal or other supplies, to be accepted or rejected at points of destination, of stipulations fixing the purchase prices as payable at points of shipment; appellant's contention being that, until actual acceptance by the Government at destinations, the title to the properties remained in the shippers, and therefore that full tariff rates, instead of fifty percent rates which had been paid by the Government's disbursing officers, were due for the transportation. An adverse decision was made by the Court of Claims on this proposition in a case of the Illinois Central Railroad Company which has been affirmed by this court (265 U. S. 209). If the facts of the two cases were substantially identical, it could not be denied that the instant case is ruled by that decision; but, actually, in some of the transactions here involved, there are variations, deemed by appellant to be materially different from anything contained in the Illinois Central case. Chief among these new points are (1) that the price of some coals was made for delivery at destination, Mobile, (2) that in some of the other instances coals were bought by the Government from dealers at Pensacola; and (3) that on carload purchases the shippers

were not only responsible for the expedition and safety in shipment, but at their own expense were to transfer coals at the railroad wharves into barges belonging to the Government and, at the option of the Government's engineers, were to tow these loaded barges at their expense to places where the coals were to be used, which, in the one case, was to be covered by the prices named for the coal and, in the other case, at proportionately higher prices, also named, for the entire service.

On all of the transactions here in suit, as in those of the Illinois Central case, the sale contracts stipulated for tests of various kinds at and beyond destinations as conditions to acceptance of and payment for the materials.

*Clearly cases in which sellers contracted to deliver property, at destinations far away, and receive their pay there, are not ruled by cases in which the prices applied at points of shipment.*

The origin of this case, as well as of the two other cases here referred to, was an attempt by Government officers to evade former rulings of the Comptroller of the Treasury which forbade the application of land-grant rates to any property which did not truly belong to the Government. Firstly, there were presented to the Comptroller of the Treasury, commencing in 1914, cases in which private contractors, who were to construct Government improvements, had shipped their materials over a land-aided road, the Government having no interest in them whatever, but having agreed with them that it would pay the freight charges and thereby obtain for them land-grant deductions. Full rates being denied to the carriers by the Government accounting officers and appeals being taken to the Comptroller, he held that the imposition so practiced on the carriers was unlawful; that the controlling

question was whether the Government owned the properties or not, and that, since it did not, it was immaterial who, by arrangements to which the carrier was not a party, paid for the transportation.

Variants of the practice thus condemned by the Comptroller were attempted by Government engineers or accountants but without success. The Comptroller held each time that the actual ownership of the property transported was the one consideration to determine whether land-grant rates or full rates should be paid.

At 20 Comptroller's Decisions 721, the Comptroller decided (1) that whether the Government should purchase properties at the initial or terminal point of shipment was purely an administrative question—the factor favoring purchase at the initial point being the applicability of land-grant rates, and the factor favoring purchase at the terminal point being escape from all the labor, expense and risk of the transportation—and (2) that the use of a Government bill of lading did not in any way change the relations of the consignor or the consignee to the carrier. Finally, in some instances, Government engineers hit upon the device of stipulating that, for any property accepted by them at destinations, the price should apply as of the points of shipment.

Since the instant case, unlike that of the Illinois Central Railroad Company, presents no transaction more than two years old when the petition was filed, no question of limitation applies. Possibly, however, there is some importance in the fact that at the times of the shipments appellant had no knowledge of any arrangements by the Government and the shippers which might tend to vest title in the Government during the transit. The court has found (Finding XV,

Rec. p. 12), that there is no evidence in the record as to appellant's knowledge of the terms of the contracts or orders or of anything, beyond the bills of lading, by which it may have been misled. The burden being on the Government to make positive proof, if there were any, it is to be assumed that nothing of the kind occurred.

**Assignment of Errors.**

Appellant says the court erred:

1. In holding that materials transported, with respect to which other services, included in the prices named, were to be performed by the shippers after reaching destinations on railroad lines, and which the United States had the option to accept or reject, after they had reached those destinations, were the property of the United States while in transit on railroad lines.

2. In holding that land-grant rates were applicable to railroad haul of materials when such haul was merely a part of services required of shippers by contract and the shippers were responsible for safe and prompt performance of the entire transportation and the materials were not to be accepted by the United States until after inspection at or beyond such railroad destinations.

3. In holding that the United States, by reason of a land-aid to a part of a railroad line, was, upon the use made of switching and hoisting appliances, at other points on said line, not land-aided, entitled to be exempted from a provision in a tariff by which liability of the shippers for switching and hoisting charges turns on the rates payable for the transportation.

4. In holding that, for services performed by switching and hoisting appliances not constructed, and which were not reached by railroad track constructed by aid

of public lands, the United States was entitled to a diminution of charges because of land-aid received by another part of said line.

5. In dismissing the petition.

**Argument.**

The question at large of the title to freights shipped under contracts by which the purchase prices were to apply f. o. b. points of shipment—inspection and acceptance at destinations being stipulated as conditions precedent to the Government's acceptance of the properties—has been decided by this court, adversely to the carrier, in the case of the Illinois Central Railroad Company, 248 October Term, 1923; but the details of fact by which to dertermine the exact point at which title passed from the shippers to the Government are not the same, nor alike, in the instant case and in that case. To an extent it would seem proper that the court, in considering this case, consult the brief of appellant in the other case, for on some points there presented, with authorities, the court did not touch in its opinion and it seems fair to assume no account was taken of them. If this latter be true, the court possibly will be disposed to hear, at the oral argument, a reference, at least, to those points and the cases on which they were rested.

265 U. S.

With respect to some purchasers of coal, the instant case is scarcely akin to anything contained in the Illinois Central case. In these instances, there was no pretense that title passed at the points of shipment. The prices applied at the stipulated point of delivery Mobile (Record, pp. 2, 3, 17, 18).

It is true the Government undertook to pay the freight charges; but there is nothing exceptional in writing into a contract a condition which would attach

without any such specification, to-wit: that the transportation charges were to fall on the consignee. What those transportation charges, or the basis for them, should be, was not specified between these sellers and the Government; and, obviously, the rights of the carrier would not be affected by any stipulations or communications between them.

In the other exceptional transactions of this case (Record pp. 3, 4, 21, 22) the coal was actually purchased by the Government from local dealers at Pensacola, who handled coals of the Tennessee Coal, Iron and Railroad Company and other miners; and, these dealers not having the specified supplies on hand at Pensacola, either they or the Government's engineer in charge communicated with the officers of that company at Birmingham, gave directions for shipments and stated that the coals would be subject to inspection and to rejection for unsatisfactory qualities.

An item of evidence regarding these particular shipments is the advertisement under which offers were received (Rec. p. 22). This stipulates for delivery f. o. b. at Pensacola.

The most remarkable feature of these sales, as stated in the same advertisement, is that the freight charges or other expense of delivery were to be borne by the sellers.

Notwithstanding all this, the Treasury officers subjected these shipments, like the others, to land-grant abatements when they came to pay the sellers for the coal.

In the remaining contracts here concerned dominion over the property did not pass out of the shippers until after the railroad haul had ended. In some instances the shippers retained control of the coals and conducted at their own expense and risk the unloading into Government barges. In other instances, after such re-

loading, the shippers towed the barges to the sites of the work, ten, fifteen or twenty miles away, and for this service received additional named compensation. If the coals did not pass into the Government's hands until after an additional haul, or until after loading into the Government receptacles, how can it be said that the title was in the Government during the railroad haul, terminating at the wharves in Mobile or Pensacola.

To these questions, which did not arise in the Illinois Central case, apt answers are afforded by some of the cases cited for the appellant in that case.

**The free-service provisions of the special tariff do not apply.**

There are two reasons why the shipments here in question were not subjects for the special advantages provided in appellant's coal tariff and its supplements:

(1) The purpose of these concessions was to promote the sale of Alabama coal, through Mobile or Pensacola, in foreign markets and, by coastwise navigation, in certain domestic markets. Here were large, practically unlimited fields for trade expansion and therefore for increase of transportation on appellant's tracks. This was essentially a different thing from supplying coal for the Government's uses whether in improving rivers and harbors or in navigating ships. The demand of these latter services was limited and scarcely would have tempted a railroad company to set up a special tariff which yielded it little or no profit. But, however this may have been, these coals were not within the purview of the tariff actually made; they were not to be sold—were not intended for trade purposes—for the Government was not in the business of selling coal, and it had no competition in its own business of improving rivers and harbors; that, by whomsoever performed, being absolutely under Government control.

*All of these coals were brought to Mobile or Pensacola for "bunkerage [on ships] and purposes other than export."* The main purposes served were engineering work along the Mississippi Sound or in Mobile River. None of the coals here concerned were "exported from Alabama and sold in foreign markets or * * * shipped to and sold in Texas or Florida markets, * * * and competed with coals mined and shipped from other regions."

To make the word "exported" doubly clear, there was added in the tariffs "and sold in foreign markets."

This court, being called on in a number of cases to distinguish the public business and public employees from other passengers in order to define the applicability of land-grant rates, has held that (1) rejected applicants for enlistment in the army, (2) retired enlisted men, on furlough, returning to their stations, (3) retired enlisted men, en route to their homes after retirement from the army, (4) discharged military prisoners and (5) members of the coast guard, while serving the Treasury Department, are not troops of the United States, and that full rates must be paid for their transportation (*United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354; *Louisville & Nashville R. R. Co.* v. *United States*, 258 U. S. 374).

In a number of cases, including that of the *Missouri Pacific Railroad Company*, No. 34581, the Court of Claims held that, because for theatrical and sporting parties, on the one hand, and United States troops, on the other hand, railroad service is not performed "under substantially similar conditions and circumstances." In the case named, the court said:

> "There is no competition between the Government and theatrical companies. They are not in the same class. They are not similarly circum-

stanced. There are various reasons of business policy which could be adduced for granting this rate to theatrical companies that would not apply to the Government. The Government in the transportation of soldiers does not, financially or in any other way, come into competition with any of the parties given special rates under this tariff, and consequently there can be no unjust discrimination and no cause for complaint.

* * * * * *

These party-rate tickets secure patronage which yields large revenue to the railroads. The withdrawal of these tickets would destroy that patronage. These and other considerations must be taken into account in determining whether there has been 'like and contemporaneous service' rendered 'under substantially similar circumstances and conditions.' The traffic provided for in the company's schedules has no analogy or resemblance to that carried on by the Government."

The Comptroller of the Treasury, in January, 1901, decided, in effect, that land-grant rates did not apply to railroad bridges crossing streams, and, citing and approving that ruling, he held that full rates should be paid for transfers connecting the tracks of land-aided lines. (8 Comptroller's Decisions, 334. Ib. 493.)

There is no apparent reason why "transportation" and the distinctions between this service and special services at terminals or elsewhere, should not be the same in relation to land-grant rates as to facilities and rates in commercial traffic. What these latter are may well be indicated by a few citations.

There were before this court in a number of cases a question which reached its final determination in *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, relating to free service between separate terminals,

or between terminals and a brewing company which was largely interested in the terminal company, to the constituent lines of that organization and denied to other lines which were not members. The effect of this decision, which justified this discrimination, turned on the proper classification of this free service. Speaking specially of the service to the brewery, the court said:

> "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887, c. 104, 24 Stat. 379, 380) renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another." (p. 481) * * *
>
> "The evidence tends to show, if it does not render it clear, that certain yards and tracks representing more than one-third of the aggregate value of the leased lands are used almost if not quite exclusively by the brewery; and raises a question whether some of the other yards, or portions of them, are not like those mentioned, actually used rather as parts of the brewery plant than as parts of the transportation system of the Railway." (p. 495.)

The subject of *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98, was a railroad rate for freight service terminating at stock yards in or near Chicago. The aggregate rate was split by the Interstate Commerce Commission and separate consideration given to so much as covered the railroad haul proper and to the part covering the delivery to stock yards. In deciding the reasonableness of the latter part of the charge, the court said (p. 109):

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the Commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

In *Southern Railway Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, the validity of a special charge made by the carrier to cover the stopping and unloading of goods in transit for inspection and reloading was upheld by this court. The court said (p. 301):

> "If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the trasportation, but outside thereof."

In some cases this court has held that carriers should not be paid for special services in transferring or other-

wise handling goods between connecting lines or between railroad tracks and places of storage; but the controlling consideration in these cases was (1) that the particular thing done was a part of the transportation, in a strict sense, or (2) that it was named along with transportation, in the bill of lading or other contract.

(2) Appellant's traffic officers, in view of the benefit it would receive from growth of the coal trade out of Mobile and Pensacola, figured that if it received $1.00 per ton for transportation, as the whole revenue when shipments were from points on its own line or as its distributive proportion when the shipments originated on lines of other carriers, it could afford to suffer the expense of spotting the cars and hoisting the coals, but that the traffic, at less revenue for the transportation, would not bear those charges; and so a tariff was made for the two conditions, open to all comers If, for example, some gross rate less than $1.00 were fixed for a new mining concern on its first legs, located on one of appellant's lines, or if, when the mine was served by some other carrier which connected with appellant's line, say, at Birmingham or Calera, and the distribution of the rate was such that less than $1.00 accrued to appellant—or if for any other personal or special reason appellant would have to accept something less than $1.00 per ton—then the spotting and switching charges would fall on the shipper. Nothing is said in the tariff, no distinction is made, as to the reasons why appellant's revenue would be less than $1.00 per ton; and so there was nothing invidious in saying that if the Government, on the score of a land-grant, paid such less rate it must, like others paying into appellant's treasury the same amount, pay also for the spotting and hoisting.

On fair analysis it will be seen that appellant received

no consideration from the Government for free spotting and switching when less than $1.00 per ton was due to appellant on account of the transportation.

Even on land-aided track the Government is not entitled to abatement of rates or anything associated with the transportation but for which specific, separate compensation is fixed. When fresh meats are shipped in a refrigerator car, the ordinary transportation rate is paid plus a special rate for refrigeration; and grain in shipment is sometimes handled by elevators, for which special compensation is paid. In such cases, even though the whole movement, with all its incidents, occurred on land-aided track, it is well that the Government must pay full compensation for the special facilities. No Government aid was given for the construction of those and therefore the Government is not entitled to any reduced rates for the use thereof.

The exemption from spotting and hoisting charges, by the terms of the rate scheme in suit, was, on "coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton of 2,000 pounds, or more." The argument of the Government's chief accounting officers is that when, say, on a haul from Birmingham to Mobile the Louisville & Nashville Railroad Company receives, as against a gross rate of $1.10 a ton, road haul revenue of 69.3 cents a ton, this exemption is due because the company, years and years ago, received something for which it since has been paying, and is now paying by receiving 40.7 cents less from the grantor than it receives from other shippers. These officers read the tariff supplement as if it read: "On coal paying the Louisville & Nashville R. R. to Mobile, Ala., and Pensacola, Fla., a road haul revenue of $1.00 per ton or more, or on which that minimum road haul revenue would be payable

except for some preceding transaction between the rail road companies and the shippers." The Government had made the mistake of confounding "revenue" with property.

It is not enough to say that revenue is one thing and property is another; there is not even any fixed relation between the two. One may have received a large gift of property from another and yet never received any revenue thereafter from that property, or indeed from any other, and so have to live off the corpus of his estate. The administrators of the Government's treasury have had ample reminders of this fact in late years. In many cases with which the Internal Revenue bureau has had to deal there have been returns, and proof, of no revenue (income) received whatever by persons who, in respect of property ownership, are very rich.

A railroad company, however rich, does not obtain revenue from everything that it does. It transports many passengers, and some freights, free of charge; but its tariffs are made with reference to the actual revenue it expects to receive and can not take account of free passes for passengers, or freight charges remitted to charitable organizations, or anything of the kind. The tariff here concerned took no account of any property of the railroad company, from whatever source derived; and the concession of free spotting and hoisting rested upon one, and only one condition precedent, viz: that there was going into the company's treasury $1.00 or more for the transportation of each ton of these coals handled.

On any shipments for which the rate, or appellant's part thereof, was $1.00 per ton or more the Government could have obtained free spotting and hoisting by paying the full rate. This, no doubt, would have been done if

the spotting and hoisting charges had been more than the land-grant deductions attaching ordinarily to the mileage employed in the transportation. The Government has elected not to pay the stipulated, full compensation; and therefore it is chargeable with the spotting and hoisting charges.

Generally speaking, the only difference between railroad traffic for Government and for private account is that in the former payment is made at the time of the service. Theoretically this is of little importance, since it is expected that the Government's disbursing officers will do their work expeditiously and fairly. Yet the postponement of cash payment has been often held (1) to bar for Government use tariffs of special, low rates published for private parties of ten or more passengers and (2) as between one of two private shippers, to constitute an unlawful discrimination. Now cash is only one kind of revenue; and if the coal tariff here in question had expressly stipulated for spot-cash payment of revenue to the amount named, the Government, unless paying in spot cash, would not be entitled to the immunities named. How then can it be entitled to those immunities when, to the extent of one-third or more of a one-dollar rate, it does not pay the railroad company any revenue, or promise to pay it any, at any time.

BENJAMIN CARTER,
*Attorney for Appellant.*